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# Two Conceptions of Justice in EU Constitutionalism

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## Two Conceptions of Justice in EU Constitutionalism

### The shaping of security law in Europe

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1. The idea of the lecture is to explain why the EU needs a more elaborated vision of justice. The starting point of the essay is the normative argument that the EU currently suffers from a justice deficit and that something needs to be done.<sup>1</sup> I will clarify this by telling you a story about European integration and its implications for constitutionalism by focusing in particular on one of the EU's most difficult albeit intriguing testing field for 'justice', the new policy area of 'freedom, security and justice' (AFSJ). The AFSJ, bundles together the most sensitive nation-state questions; the last bastions of national sovereignty that now belongs to EU law, such as criminal law, security, migration, border control and civil law cooperation. It is a very divergent policy area and one where the EU is currently working out what mainstream principle in EU law can successfully be transplanted to govern this new area of the law.

So, imagine you were to ask the following question: how can the EU become a *justice* space while ensuring a high level of security? What justification in legal terms could Member States and the citizens of the EU rightly demand as the EU project expands? In this paper, I explore the question of how to understand the conditions of constitutional legitimacy by arguing for a meaning of justice which forms part of the EU's constitutional structure and helps ensuring a sufficiently high human rights standard

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<sup>\*</sup> Inaugural lecture delivered 29<sup>th</sup> October 2014, VU University Amsterdam. I would like to thank Jonathan Yovel and Elies van Sliedregt for helpful comments on an earlier draft, with the usual disclaimer. The paper has retained the character of a public lecture. Email: e.herlinkarnell@vu.nl

<sup>1</sup> For a recent book tackling justice issues in the EU see, G de Burca, D Kochenov and A Williams, *Europe's Justice Deficit* (Hart publishing), forthcoming

that would foster European culture and a sense of fairness. I argue that this is particularly needed for the construction of the AFSJ to a successful “justice” space.

But first, a remark regarding the title of the lecture: “two conceptions of justice”? Are there not as many conceptions as there are interpreters? Surely there are; justice is a highly multifaceted notion. While legal theorists such as Dworkin, explained with great sophistication the meaning of a conception as forming a part of the underlying interpretation and rivalry rationale behind a concept, by limiting the discussion to two conceptions of justice I organize the question around a more specific jurisprudential understanding.<sup>2</sup> For the purposes of this lecture I am referring to an administrative notion of justice and a constitutional- more critical conception- of it. Both play an important role in contemporary EU constitutional law, but they are slightly different. The administrative conception, as understood in this lecture, is a question of how to guarantee the access to justice in European law, while making sure that the EU lives up to standards of good conduct. That is all very important, and connected to the long-lasting issue of how to convince nation states into doing their job as ‘European states’ as part of the mission of creating a more integrated Europe; and the role of national courts in this process and where the individual can claim EU legal rights in the national system. But as I argue in this lecture, it is not enough. With a critical concept, justice as a question of constitutionalism is tied to the broader governance question of the EU as a polity. My argument is that there are potentials for using the conception of justice as a way of understanding the wider governance structure of the EU and its relationship to constitutionalism, which is contextualized but ensures the rights guaranteed by the EU Charter of Fundamental Rights. The notion of justice would then form part of not only the individual’s right to access to justice, in concrete court cases, i.e. not just an administrative concept but also constitute a broader principle for creating the AFSJ. Such a conception of the AFSJ would value not merely security, but equally, ensuring freedom and justice - and thereby overall fairness of the system.

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<sup>2</sup> R Dworkin, *Law’s Empire* (Hart publishing 1986), page 98-99.

And so, the underlying question of the project must be this: what are the core constitutional challenges facing the EU and how can justice function as a device for improving the lives of Europeans? Can it? When discussing the EU and its relationship to justice let me place it in context by briefly addressing the political situation that the EU is facing with regard to the concept of constitutionalism before moving on to illustrate this by drawing on concrete examples from the AFSJ and the impact of justice reasoning.

## **2. EU constitutionalism and crisis driven agenda**

EU Constitutionalism is a crisis driven agenda: the need to respond to various political crises has been the hallmark of EU integration and perhaps its main drive. Much of the attention given to the EU today emanates from the 2008 financial crisis and its slow recovery. The discussion on a Banking Union and the ESM treaty and the on-going financial crisis are examples of where the EU needs to respond to new threats and is acquiring ever more State like features.<sup>3</sup> On the one hand, the crises means that it is bringing Europe together to an ever tighter financial space. On the other hand it *also* means that Europe has attracted even more scepticism from many national political parties; fragmenting the desire for unity and solidarity, and increasing the likelihood of disintegration.<sup>4</sup> But it is not only the economic aspect of a European super power that merits attention. A recent example is that of European Border Security in particular, the European asylum crisis and the drowning of migrants on their way to Europe, such matters seriously jeopardizes the EU's claim of political legitimacy.<sup>5</sup>

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<sup>3</sup> See e.g. F Amtenbrink, 'Europe in Times of Crisis: Bringing Europe's citizens Closer to One Another?' in M Dougan, N Nic Shuibhne and E Spaventa, *Empowerment and Disempowerment of the European Citizen* (Hart publishing 2012).

<sup>4</sup> For recent analysis on European integration, S Hobolt, 'Public opinion and integration', in E Jones, A Menon and S Weatherill, *The Oxford handbook of the European Union* (OUP 2012), H Volland, 'Explaining European Integration' (2014), JCMS 1142,

<sup>5</sup> Migrants Drown as Libya Boat to Italy Sinks, BBC NEWS (May 12, 2014), <http://www.bbc.com/news/world-europe-27379493>; Frances Webber, The Cradle or the Grave? EU Migration Policy and Human Rights, 23 STATE WATCH J. 3, 4 (2014) Europe Pledges Aid to Italy for Refugees, published 9 October 2013, <http://www.nytimes.com/2013/10/10/world/europe/europe->

In other areas, the EU is stepping up to fight against cybercrime and money laundering and is adopting a new system to fight against transnational crime.<sup>6</sup> The constant response to security concerns means that the EU is currently very active in this area. For example, the EU has numerous agreements with the US and is, inter alia, engaged in the creation of a transatlantic terrorism tracking system as well as far-reaching cyber crime regulation, which means that anyone trying to understand EU law today also needs to understand the inherent dynamic of the EU's relationship with the rest of the world.<sup>7</sup> Many examples can be given here of the societal issues that are confronting the EU at this very moment and how closely interlinked the legal and the political are in this area.

The EU is currently facing numerous interrelated challenges, and needs to deal with a broad range of issues ranging from how to tackle the growing national populism movements, i.e. anti-EU parties on the rise and associated fears of disintegration, to the Europeans joining terror organizations like "IS" outside Europe's borders which pose yet another terrorist threat for the EU to deal with. Just to give you an example, the European Council recently issued a recommendation, following a UN SC resolution regarding the use of criminal law as an effective response to the phenomenon of European-born fighters leaving the EU for terrorism further afield.<sup>8</sup> Clearly, this is important but principally serves to illustrate the speed at which EU criminal law has to react to new situations it might not yet be ready to meet. In addition, the more mainstream disintegration trend where not all Member States are moving in the same direction (the so-called multi-speed phenomenon) poses a challenge to the EU's ability

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[pledges-aid-to-italy-for-refugees.html?\\_r=0](http://ec.europa.eu/news/justice/index_en.htm), <http://www.statewatch.org/news/2013/oct/eu-council-surveillance-sea-borders-13331-13.pdf>

<sup>6</sup> The Commission's website is instructive, [http://ec.europa.eu/news/justice/index\\_en.htm](http://ec.europa.eu/news/justice/index_en.htm)

<sup>7</sup> Directive 2013/40/EU, L 218/8 directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA. See also the Proposal for a Cybercrime Directive, COM(2010) 517 on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.

<sup>8</sup> Following a UN Security Council Resolution 2178(2014) which calls on the members of the UN to reinforce their engagement against terrorism.

to ensure consistency and effectiveness of its own actions.<sup>9</sup> In short, the EU is increasingly depicted as being in a state of crisis and it seems a fair assumption to acknowledge that it is. Consequently, the task of constitutionalism is exactly this: to provide a framework for understanding EU constitutionalism as an integral part of the governance structure of the EU; despite crises and with better understanding.

Why is the concept of justice relevant here?

Rawls famously lay the foundation for justice reasoning in legal theory by placing it in the context of the good structure of society.<sup>10</sup> In doing so he grounded the procedural notion of justice in the normative concept of “fairness”. Some pre-political moral commitments are identified as constitutive of the concept of justice and are then formulated as a conception of justice through an appropriately specified procedure. The primary issue in the EU context is whether justice can appropriately be debated in the EU supranational sphere, “the meta-state”, or whether it is predominantly a local phenomenon.

My claim here is that the template of justice, and I am here relying on the work of Forst and others<sup>11</sup>, is applicable to the international sphere and that it is a societal notion that has to be read in the light of the current transnational reality and is particularly relevant to EU constitutional law .

### **3. Why there is a justice deficit in the EU and what can be done about it**

So to my first question, the starting point of this lecture: does the EU have a justice deficit and if so, what, if anything can be done about it? Apart from the well-debated terrain of who can actually access the European Court of justice through direct or indirect action and the boundaries of the preliminary ruling procedure, what I have in mind for the purposes of this lecture is a different kind of justice issue.

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<sup>9</sup> For a recent collection of essay on differentiated integration, e.g., S Blockmans (ed), *Differentiated integration in the EU: from the inside looking out*, CEPS (2014), working paper series

<sup>10</sup> J Rawls, *A Theory of Justice* (1999 edition Harvard)

<sup>11</sup> R Forst, *Justification and critique* (Polity press 2014).



Again, think of the current migration crisis with refugees drowning on their way to Europe<sup>12</sup>, think of how much of the current European regulation of criminal law, in the wake of 9/11 is predominantly concerned with how to detain those suspected of crime from other 'good' Europeans. Think of how much of the EU anti-terrorist strategy has been focused on prevention while little focus has been placed on the right of due process. Think of the recent secrecy debate in Europe, spying scandals and the transatlantic dynamics with regard to data protection of European citizens vis-a-vis security related cooperation with third states, most prominently the US.<sup>13</sup>

In the light of the EU's promise of establishing an Area of Freedom, Security and Justice; the one sided current focus on security appears highly problematic. Nevertheless, the EU's security mission equally follows from the ambitions set out in the Treaty since the EU promises to ensure a high level of security even where there is no clear division between internal and external security. The focus on security, and the desire to import norms from the global arena in the fight against terrorism and crime, has overshadowed the need to ensure due process rights within the EU. And although the EU is currently improving the situation for suspects by adopting legal safeguards and the Court of Justice has from time to time handed down rulings in favour of the individual, it is currently not enough from the AFSJ which places equal value on all components of freedom, security and justice. Security has functioned as an identity-building power which has largely shaped Europe with regard to security governance. As Karlo Tourli puts it: war and crime, external and internal security are hard to keep separate in combating terrorism leading to the emergence of a Security constitution.<sup>14</sup> Similarly, I have previously pointed to the emergence of a preventive regime, increasingly mainstreamed with EU law on general market construction.<sup>15</sup> Indeed, much of the EU's

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<sup>12</sup> See most recently, D Caruso, 'Lost at Sea' (2014) *German Law Journal*, 1197

<sup>13</sup> See e.g. D Curtin, *Top Secret Europe*, (2011, University of Amsterdam publication)

<sup>14</sup> K Turolí, 'Ultima Ratio as a Constitutional Principle'. (2013), *Oñati Socio-legal Series*, 3 (1), 6-20.

<sup>15</sup> E Herlin-Karnell, 'The development of EU precautionary criminalization', (2011), *EUCrim L Rev*, 149.

involvement has been centred on the need to secure a high level of security which is reflected in the basic market rationale in the EU where the achievement of security is part of the market focus. It is a confirmation of the many different layers that signifies the AFSJ; how the external and internal interacts – making the application of mainstream constitutional principles in the AFSJ a particularly difficult task for the EU legislator. The latter concern is shared by many political scientists who have described the EU state of play as one of a European homeland security in the making.<sup>16</sup>

The general conclusion that can be drawn here is that there is a persistent need for more elaborate vocabulary and nuanced approach to what is actually at stake. Certainly, this is the job of the legal scholar. Our job is to insist on the need for the EU to work out a clear agenda for the successful construction of an AFSJ which fully respects the rule of law and human rights. After all, if we were to subscribe to the preventive rationale and take it one step further, it could be asked why it is necessary to wait until the crime has already been committed (the why wait for a crime argument)? This has some echoes of general prevention, in terms of detention, which by some criminologists in previous decades was seen as the ultimate answer to a successful criminal law policy.<sup>17</sup>

Yet, what is the point of constitutionalism in a security dominated AFSJ? Is not what I have described more of the flavour of administrative law and the need to predict the future in line with the precautionary principle, or global administrative law rather than that of constitutional law proper? In other words, should we focus more on accountability as inherent in the administrative law project of the EU which doubtless is an extremely important task for the EU? Perhaps that would fit the current model of the

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<sup>16</sup> C Kaunert & P Pawlak (eds) , *European Homeland Security: A European Strategy in the Making?* (Routledge, 2012), M Fichera & J Kramer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013), M de Goede, 'The SWIFT Affair and the Global Politics of European Security', (2012) 50 *JCMS*, 214.

<sup>17</sup> For an exploration of risk in modern criminal law, L Zedner, (2009). *Fixing the future? The pre-emptive turn in criminal justice*. In B. McSherry, A. Norrie, & S. Bronitt (Eds.), *Regulating deviance*. Oxford: Hart Publishing and V Tadros, 'Controlling Risk' in A Ashworth & L Zedner (eds), *Preventive Justice* (Oxford University Press 2014), available at <http://www.law.unc.edu/documents/faculty/adversaryconference/controllingrisk.pdf>

preventive regime better than that of a constitutionalist world view of the EU?<sup>18</sup> I think not. At its heart, the EU has its constitutional structure in the commitment to human rights, democracy, and the rule of law. The debate about the constitutional character of EU law should be understood as a debate about how to understand the conditions of constitutional legitimacy and European authority.<sup>19</sup> The constitutional thinking of justice then goes beyond that of administration in guaranteeing human rights protection, while it still has to answer the accountability question as related to the democratic deficit problem. It goes to the question of how to address the current EU crisis and the increased demands for a better democratic yardstick.

After having briefly outlined the importance of constitutionalist view as interacting with the administrative law lens and after having addressed the problems with the current security dogma in AFSJ law, the natural question is what can be done about it and what is the added value of EU constitutionalism here?

Let me illuminate this by turning to two of the most important in EU constitutional principles: the rule of law and proportionality and explain why they matter for the conception of justice in AFSJ law.

#### **4. The rule of law and the link to justice**

The rule of law is the starting point for any discussion of EU constitutionalism, given the public law nature of much of the EU's activities controlling coercive power and respecting human rights. The rule of law is also associated with the notion of

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<sup>18</sup> P Lindseth, *Power and Legitimacy, Reconciling Europe and the Nation-State* (Oxford University Press 2010)

<sup>19</sup> See M Kumm, 'Constitutionalism and the Cosmopolitan State, An Integrated Conception of Public Law', (2013) *Indiana Journal of Global Legal Studies* 605

legitimacy.<sup>20</sup> For one thing, the question of legitimacy and the aspiration to achieve justice are not necessarily the same thing. After all, law may be ‘just’ without having been legitimately enacted, and legitimate while failing to be just.<sup>21</sup> The rule of law presupposes, therefore, that both of these criteria are fulfilled. The point is that we need an elaborated version of justice anchored in the rule of law that takes into account context but ensures a standard of valid law. Justice would then form a core part of the rule of law and perform a crucial role in the context of what it means to speak about constitutional principles in an AFSJ that is *constitutional*.<sup>22</sup> Naturally, rule of law is a constitutional principle of the EU and is listed in the Treaty as one of the inspiring principles of the EU. It is also deeply connected to the constitutional question regarding the objectives the EU should safeguard and the limits set by the Treaty.<sup>23</sup>

What is then, the right balance to be struck in AFSJ law, and what kind of justification would justify the restriction of freedom to ensuring more security in a particular area? The kind of justification that could be invoked, I argue, is linked to the proportionality test in concrete European court of justice cases.

Let me explain this by linking the importance of the rule of law to the principle of proportionality and why these axioms shape the AFSJ.

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<sup>20</sup> J Raz, ‘The Rule of Law and its virtues’ (1977) 93, *Law Quarterly Review* 195, S Douglas-Scott, *Law After Modernity* (Hart publishing 2013).

<sup>21</sup> C Larmore, ‘What is Political Philosophy?’ *Journal of Moral Philosophy* 10:3 (2013), 276-306.

<sup>22</sup> On critical legal justice and the rule of law see S Douglas-Scott, *Law After Modernity* (Hart publishing 2013).

<sup>23</sup> Article 2 TEU.

## 5. Justice as a right to justification in the AFSJ

Constitutional law 'institutionalizes' a right to justification, which is reflected in the general proportionality test in EU law.<sup>24</sup> Proportionality in EU law is taken to mean balancing means and ends with 'appropriateness' as the golden thread for deciding on the desirability and need for EU action in a given area. Indeed, proportionality was referred to in the early days by the Court of Justice and was closely associated with creation of human rights protection in the EU.<sup>25</sup> The assumption is that interference with EU law rights should be kept to a minimum; the test being whether it would be manifestly disproportionate to interfere with those rights.<sup>26</sup> Moreover, in classic "free movement" law the concept of proportionality controls the degree to which the Member States may derogate from their EU law obligations. While much of the discussion on proportionality concerns the merits of this principle as either an addition to human rights protection, or a threat to it when used by authorities to minimize rights in the name of derogations from rights<sup>27</sup>, my understanding of proportionality is that it is a tool for legal reasoning which is preferable to no check at all. Despite its flaws of vagueness and indirectly eroding human rights, I believe the proportionality principle has more to offer than lose and can be used effectively to guarantee rights.

This becomes of course all the more complex in sensitive areas such as those pertaining to the AFSJ, since here, proportionality has at least two different implications. One reflects the need to balance the application and enforcement of e.g. penalties and the criminalization of conduct in itself (so as to avoid using, for example, arrest warrants for minor offences). The other reflects the need to combine effectiveness and human rights

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<sup>24</sup> On proportionality, K Møller, *The Global Model of Constitutional Rights* (Oxford University Press 2012), M Kumm, 'Democracy is not enough: Proportionality and the point of Judicial review', available at <http://www.law.harvard.edu/faculty/faculty-workshops/kumm.paper.i.pdf>, P Craig, 'The Nature of Reasonableness Review' (2013) *Current Legal Problems* 1

<sup>25</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. P Craig, *EU Administrative Law* (Oxford, Oxford University Press 2012) 670-672.

<sup>26</sup> E.g P Craig, 'Proportionality, rationality and review' (2010) *New Zealand Law Review* 265.

<sup>27</sup> A Barak, *Proportionality, constitutional rights and their limitations*, (Cambridge University Press 2012).

protection.<sup>28</sup> Obviously, the idea of balance may sometimes be problematic. Yet, if the EU wants to make a difference, a uniform approach to safeguards at the highest level might be worth the price of allowing for less flexibility for Member State derogations in, for example, criminal law.<sup>29</sup>

The AFSJ is a clear example of how one of the most significant challenges faced by EU law consists of identifying criteria for proportionality based on some common standards, which permits a degree of elasticity without endangering human rights. Proportionality is therefore also part of the wider governance structure regarding how to construct an AFSJ space which contributes to justice through a sufficiently high level of human rights protection at the EU level which (or has the potentials) breeds fairness in the system.

## **6. The two conceptions**

And yet, I need to anchor my argument in the title of this presentation. What precisely are the two conceptions of justice that I am referring to?

### **6.1. The administrative notion of justice**

A narrow conception of justice is one which is purely procedural in nature. Justice could then take the form of an administrative code that restricted institutional behaviour only in procedural terms.<sup>30</sup> The standard would be one which is reflected in good administration in EU law: openness, transparency and the proper administration of justice, the duty to act fairly, and other principles that constrain the abuse of power. Such is the arsenal of the EU's enforcement principles such as supremacy, direct effect and indirect effect that it insists on allowing the individual to claim European rights in national courts even when the Member States in question has failed to implement for

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<sup>28</sup> M Fichera & E Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' *European Public Law* (2013) 759

<sup>29</sup> Ibid.

<sup>30</sup> A Williams, *The Ethos of Europe* (Cambridge University Press 2011)

example a Directive. As I said before this is very important, but it is not enough: the EU is taking on increasingly state-like features, and while the EU is adopting a thin version of democracy, it has to convince its Member States and citizens that the Area of Freedom, Security and Justice is an area that contributes to justice.

But how will we know when we see ‘constitutional justice’?

## **6. 2 Constitutional justice – governing principle**

While ideal justice seems too rosy a story for the current reality of EU integration, especially in the area of security, striving for justice can only improve the situation by turning to a constitutionalist view.

Perhaps this poses the question to what extent is justice a constitutional principle or whether it is more of an EU objective. Regardless of the answer to the question, justice forms part of the rule of law – discussed earlier – and is of crucial importance in the context of what it means to speak about constitutional principles in an AFSJ that is constitutional in the sense that it ensures fairness by turning to a conception of justice that is grounded in a political understanding of the context, which would be an especially useful lens for the EU hybrid governance/constitutionalist structure. The notion of justice, in this respect, is not about the allocation of goods but rather works as a tool – in line with the legal instrument of proportionality – which tracks down arbitrary reasoning where it exists.<sup>31</sup> So justice, in this respect, is also part of the EU non-discrimination axiom and its relevance as a constitutional principle is how it is reflected in the right to justification. Such a reading is not one that focuses on the merits of realism or moralism, but accepts social relevance and reads political aspects to the law with human dignity as its compass. More simply put, there needs to be a common sense element and a level of sophistication when discussing the AFSJ that is not just driven by panic legislation in the name of security.

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<sup>31</sup> R Forst, *The Right to justification* (Columbia 2012).

For citizens to accept situations where they find themselves in a minority, they must have endorsed what Rawls once called “constitutional essentials” of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason.<sup>32</sup> Again, how can the EU ensure legitimacy of the system, when based on a thin version of democracy beyond the nation state? This is clearly a tricky question from a legitimacy perspective since what justice really means when applied as a borderless phenomenon is a process, and the task for lawyers is to ensure that a high human rights standard does not get lost in this trajectory.

Let me turn to two final examples.

## **7. Migration law –How legitimate is the EU?**

The migration crisis has hardly escaped anyone. It is not clear as to how there can be a common European solidarity here when little is done at the political level.<sup>33</sup> Moreover, it could perhaps be questioned if it is legitimate to claim that the EU should create a justice space within the AFSJ, which excludes third country nationals? Should we accept a Cosmopolitan claim of a duty of justice towards outsiders?<sup>34</sup>

While it would seem politically utopian to claim a cosmopolitan based justice when some old Member States still have problems with ‘new’ Member States, the conception of justice could still inform the European Treaty-based interpretation of what it means to refer to solidarity. Increasingly, the EU invokes criminal sanctions as a preventive strategy in dealing with migrants put in detention as part of the securitization of the AFSJ. So as to the first question, is there a justice deficit? The answer is once again yes.

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<sup>32</sup> J Rawls, *Political liberalism* (1993, Columbia press)

<sup>33</sup> A Sangiovanni, ‘Solidarity in the European Union’ (2013) *Oxford Journal of Legal Studies* 33: 2.

<sup>34</sup> On cosmopolitan law, see e.g. M Kumm, ‘Constitutionalism and the Cosmopolitan State, An Integrated Conception of Public Law, (2013) *Indiana Journal of Global Legal Studies* 605, A Somek, *The Cosmopolitan constitution* (Oxford University Press 2014)



The Court of justice has provided a touchstone of sympathy by arguing for a nuanced approach of ‘mutual recognition’ as not being absolute. In the NS<sup>35</sup> case in the context of the EU asylum system, the Court of Justice asserted that if there are substantial grounds for believing that there are systematic flaws in the asylum procedure in the Member State responsible than the transfer of asylum seekers to that territory would be incompatible with the Charter of Fundamental Rights. The importance of the Charter for the future of the AFSJ cannot be underestimated, as it constitutes an important ‘justice’ document (I leave aside here the legal technical issue of when it is applicable and not).

However, elements of adjudication are not enough, the question is really one that should be high up on the EU political agenda and where a constitutionalized conception of justice adds to the integrity of Area of Freedom, Security and Justice Law.

### **7.1. Criminal law**

As I mentioned earlier, criminal law, the increased terror threat and the need for the establishment of a preventive regime, continues to be one of the most dynamic areas in modern EU law. While the fight against terrorism has been the main EU priority since 9/11, it would appear that as a consequence of the financial crisis, white collar criminals now the new financial terrorists. Add to this the new threat of cybercrime. The EU is currently adopting a new framework to fight money laundering and cybercrime involving tax evasion and this is seen as way of fixing the financial crisis.<sup>36</sup>

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<sup>35</sup> C-411/10 and C-493, judgment of 21 December 2011

<sup>36</sup> Directive 2013/40/EU, L 218/8 directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA. See also the Proposal for a Cybercrime Directive, COM(2010) 517 on attacks against information systems and repealing Council Framework Decision 2005/222/JHA. On the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM (2013) 45 /3, proposal endorsed by the European Parliament on 11 March 2014.

Much of the EU's criminal law cooperation is based on mutual trust in the respective Member States, promoting the idea is that arrest warrants and the like can be circulated freely within the Union. The difficulty in this area is that the notion of trust has been a tricky parameter to monitor and initially was pushed in favour of justifying increased EU action to fight crime. In its recent communication on the trajectory to Europe 2020, the EU Commission states that people are increasingly crossing borders and that they are increasingly frustrated with the cumbersome procedures, especially in criminal law. Interestingly, the Commission links this to the economic crisis and points out that, as a result, border crossing has affected the efficiency and capacity of some national legal systems and that this undermines trust. More trust is needed!

But is this expectation of trust not, deep down, a question of how to ensure the fairness of the AFSJ structure? Surely such fairness would increase the overall trust in the Member States if the standard that the EU offers is not a minimum but a higher standard while acknowledging that in some cases the EU could learn something from national law. Again, what the EU needs in this area is to work out its narrative: a constitutionalized vision of EU justice would ensure that due process rights are lived up to.

### **8. Is the critique of the 'utopian' EU legal scholar too pessimistic?**

While the turn to justice as part of the EU's constitutional struggle may seem an overly romantic view of the EU's future and dynamics in times of financial crisis, it is nonetheless a conception which forms part of the EU's insistence and enforcement of values. If the Union is to survive and flourish, instead of focusing on the 'otherness'<sup>37</sup>, i.e., those outside the EU territory and rather than concentrating mainly on the coherence of EU action in external relations, there is a need for the EU's institutions to think critically about the coherence of its internal policies.<sup>38</sup> The problem is that the EU

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<sup>37</sup> I Ward, 'Identifying the European Other', (2002) *International Journal of Refugee Law*, 221

<sup>38</sup> See e.g. K. A. Nicolaïdes and R. L. Howse, 'This Is My EUtopia. . .': Narrative as Power' (2002) 40 *Journal of Common Market Studies* 767.

is moving forward blindly, particularly since the failure of the Constitutional treaty in 2005. The EU's search for a new narrative, and ability to respond to new challenges, would arguably be better served by also ensuring its policy within the AFSJ is consistent with the structure provided by the Charter of Fundamental Rights and the values set out in the Treaty which seek to ensure fairness of the EU's constitutional universe and where the individual is placed at the center of the debate.

In conclusion, we need more than a conception of justice that is just centered on the administration in concrete court cases but one that operates as part of the EU's constitutional governance endeavour which is part of the constitutional structure of the EU, not a rivalry theory. And my ambition with this lecture was to show you why the AFSJ is a particularly useful testing field for this question as one of the most urgent and dynamic domains at present, and where a grammar of justice will add to the EU's credibility.

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